Insurance Implications Of EPA's New Coal Ash Rules

Law360, New York (March 19, 2015, 10:45 AM ET) --

In December 2014, the U.S. Environmental Protection Agency issued new rules regulating the disposal of coal combustion residuals, commonly known as coal ash, under the Resource Conservation and Recovery Act. As CCR producers begin to digest and comply with these new rules, they should consider whether previously purchased insurance may be available to cover some of this new legal liability and related costs. Many operators purchased general liability and excess insurance policies before 1985, and these and modern day pollution legal liability policies could provide coverage.

New Coal Ash Regulations

The production of electricity from the combustion of coal creates CCRs. The EPA estimates that approximately 40 percent of CCRs were put toward beneficial uses in 2012; the remainder is identified as having been disposed in surface impoundments and landfills. The EPA has identified 310 active on-site CCR landfills averaging 120 acres each in size and 735 active on-site impoundments averaging 50 acres each in size. Historically, the numbers of landfills and surface impoundments are even greater and the amount of CCRs used beneficially was smaller. These waste enclosures have not been heavily regulated in the past.

In 2010, the EPA proposed two potential alternatives for regulating coal ash. Under one alternative, coal ash would be regulated as a special waste under RCRA Subtitle C. Under the other alternative, it would be regulated as a nonhazardous solid waste under RCRA Subtitle D. The path taken had potentially drastic implications for CCR producers.

Regulation of CCRs under Subtitle C would have given the EPA direct oversight of disposal units and applied to every phase of CCR management, including generation, transport, storage and disposal. Under Subtitle C, CCR disposal units would have required a permit. In addition, surface impoundments and the wet handling of CCRs effectively would have been phased out.

Regulation under Subtitle D was anticipated to be less stringent. Under Subtitle D, the EPA lacks permitting or enforcement authority; enforcement is left to the individual states and to citizen suits. Subtitle D applies only to the disposal of CCRs and not their predisposal life (i.e., generation, storage and treatment). Subtitle D does not curtail the use of surface impoundments. Instead, it sets location, design and operating standards for certain types of impoundments.

Following the announcement of the proposed regulations in 2010, the EPA received more than 450,000
comments. The EPA’s failure to act promptly resulted in environmental groups suing the agency in 2012 to compel the issuance of a final rule. On Dec. 19, 2014, the EPA issued a final rule that regulates CCRs under RCRA Subtitle D as a nonhazardous solid waste. Despite its issuance in December, the rule has not yet been published in the Federal Register. The EPA is said to be working on clarifications. After publication in the Federal Register — which the EPA recently suggested might happen in the next few weeks — the rule will take effect six months later.

The new rule regulates the disposal of CCRs and establishes minimum national criteria for both existing and new CCR disposal units, both surface impoundments and landfills. The rule establishes minimum national criteria, including location restrictions, design and operating criteria, structural integrity requirements, groundwater monitoring and corrective action requirements, closure and postclosure care requirements, and recordkeeping, notification and Internet posting requirements.

Of particular relevance to insurance recovery are the groundwater monitoring and corrective action requirements and the closure and postclosure care requirements. The groundwater and corrective action criteria require the owner-operator of a CCR disposal unit, in certain circumstances, to install a system of monitoring wells and to specify procedures for sampling the wells and analyzing the data collected in order to detect the presence of hazardous constituents released from the unit. If groundwater monitoring demonstrates exceedance of standards for identified CCR constituents, corrective action will be required. Corrective action under the RCRA and related Hazardous and Solid Waste Amendments would require owner-operators to address contamination regardless of when the waste was placed in the unit. This may have insurance implications.

**Potential Insurance Coverage**

Although the EPA’s decision to regulate coal ash under Subtitle D instead of Subtitle C is a “win” for industry, the new regulations require substantial action at a substantial cost. To the extent these actions demonstrate groundwater contamination caused by surface impoundments in operation prior to the mid-1980s, historic insurance may be available to help defray the costs of investigation and cleanup.

To reiterate, the new coal ash regulations may require groundwater monitoring and, to the extent groundwater contamination is detected, corrective action pursuant to RCRA, HSWA or state equivalent statutes. Third-party liability on account of property damage is covered under premid-1980s general liability policies. Groundwater generally is considered the property of the state (i.e., third-party property), and thus courts generally have held that damage to groundwater — or an imminent threat of damage to groundwater — is within the coverage of third-party liability policies. Importantly, premid-1980s general liability policies were written on an “occurrence” or “accident” basis, providing coverage for occurrences or accidents that take place during the period of the policy, even if the policyholder’s liability does not arise until decades later. This is known as long tail coverage. For example, if a coal ash surface impoundment caused groundwater contamination in 1965, a 1965 liability policy may respond and provide coverage for legal liability first imposed in 2015. The new coal ash regulations are clearly a newly imposed legal liability.

CCR producers that face liability as a result of the new coal ash regulations therefore should consider whether they may have insurance coverage to help pay for a portion of their damages. For companies with coal ash surface impoundments that were in operation prior to the mid-1980s, historic general liability policies should be reviewed with an eye toward determining whether prior settlements (e.g., of manufactured gas plant claims) may have released such coverage. For companies of more recent vintage, a review of current PLL policies also should be undertaken. This review should be completed
expeditiously as these policies are nearly all written on claims-made forms. While not a panacea, insurance may serve as a loss-mitigation resource for a CCR producer facing liability as a result of the new coal ash regulations.

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[1] Beginning in the mid-1980s, the insurance industry inserted “absolute” pollution exclusions into standard-form general liability policies that, with few exceptions, barred coverage for liability from property damage resulting from traditional pollution exposures emanating from industrial operations.

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